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No. 90-1230

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARY MCDERMOTT AND ALPHONSE IANNACONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners, who conspired to make false arrests of seven citizens, were properly charged under 18 U.S.C. 241.

2. Whether petitioners, who falsely arrested an inhabitant of the United States, were properly charged under 18 U.S.C. 242.

3. Whether the grand jury that indicted petitioners was biased against them because the indictment identified the race or national origin of petitioners' victims.

4. Whether the prosecutor's closing argument denied petitioners a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 918 F.2d 319.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1990. The court of appeals denied a petition for rehearing on November 7, 1990 (Pet. App. B1). The petition for a writ of certiorari was filed on February 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on seven counts of conspiring to violate the constitutional rights of seven different citizens by arresting them, knowing the arrests were without justification (18 U.S.C. 241), and one count of depriving a non-citizen resident of his constitutional rights by arresting him, knowing the arrest was without justification (18 U.S.C. 242). Both petitioners were sentenced to two-year terms of imprisonment. The court of appeals affirmed. Pet. App. A1-A22.

1. From May 1983 to March 1984, petitioners, partners in the anti-crime unit of the New York City Transit Police Department, falsely arrested seven men for sexual abuse and one man for attempted grand larceny and "jostling" on the Lexington Avenue subway line. Pet. App. A2-A3. Each of the eight falsely arrested men was ordered off the train, transported in handcuffs to a police station, detained there for 2 to 4 hours, and told when to appear in court. *Id.* at A3-A9.[1] In each case, petitioners filed police reports that contained materially inaccurate descriptions of the events. With one exception, all charges were dropped without disposition prior to trial. *Ibid.*[2] Petitioners' defense consisted

[1] The government's proof at trial included the testimony of all eight men falsely arrested by petitioners, the nine purported victims of the arrested men (all of whom testified that nothing had happened to them), several Assistant District Attorneys from the New York County District Attorney's Office who had interviewed petitioners and prepared the criminal charges following the arrests, and an expert in police procedures. Pet. App. A9. The government also introduced petitioners' diaries and arrest reports, various statements made by petitioners, as well as petitioners' sworn testimony in a civil action filed by one of the arrestees. *Ibid.*

[2] One of the men pleaded guilty, on the advice of a lawyer, to disorderly conduct because "he did not want to go to court and lose a day's pay." Pet. App. A6.

of two expert witnesses: a lieutenant with the transit police, who testified about police procedures, and a psychologist, who testified about sexually deviant persons who achieve sexual gratification by illicitly touching non-consenting persons. *Id.* at A9.

At the conclusion of the evidence, petitioners requested the district court to amend the indictment to eliminate its references to the arrestees' race or ethnicity. Pet. App. A14-A15. The district court did so and sent the case to the jury, which found both petitioners guilty on all counts.

2. The court of appeals affirmed. It rejected petitioners' contention that Section 241 applies only to persons "who take the law into their own hands, like members of a mob, vigilantes, the Ku Klux Klan, or the like," and not to police officers who conspire to deny the constitutional rights of citizens by falsely arresting them. Pet. App. A11.[3] The court likewise rejected the claim that a police officer who makes an arrest in bad faith, knowing that it is without probable cause, does not violate Section 242. Pet. App. A13.[4] The court also held that the district court's deletion of the indictment's reference to the race or ethnicity of the arrestees

[3] Section 241 of Title 18 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any [citizen] in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States,
>
> * * * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

[4] Section 242 of Title 18 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined not more than $1,000 or imprisoned not more than one year * * *.

did not constructively amend the indictment in a manner that prejudiced petitioners. *Id.* at A14-A15. Finally, the court of appeals rejected petitioners' argument that the government's summation deprived them of a fair trial. *Id.* at A16-A20.

ARGUMENT

1. Petitioners contend that they could not be properly convicted of violating 18 U.S.C. 241 because as government officials they were "not * * * member[s] of * * * a mob operating out of the context of official procedures" (Pet. 8). In other words, petitioners claim that Section 241 does not apply to police officers who violate citizens' rights in the course of their police duties. That argument is incorrect.

In *United States* v. *Price*, 383 U.S. 787 (1966), a local deputy sheriff had conspired with others to murder three civil rights workers. In rejecting Price's contention that Section 241 did not apply to his acts, this Court explained that "[t]he language of Section 241 is plain and unlimited. * * * [I]ts language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." 383 U.S. at 800. Accordingly, the statute "must be read as it is written * * *. It extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons." *Id.* at 798; see also *United States* v. *Guest*, 383 U.S. 745, 753 (1966) ("when Section 241 speaks of 'any right or privilege secured . . . by the Constitution or laws of the United States,' it means precisely that"). Petitioners' acts—a conspiracy to deprive citizens of their liberty—plainly fall within the reach of the statute.[5]

[5] Petitioners arrested their victims "knowing that the arrest[s] [were] false, baseless and without probable cause." Pet. App. A10. It is beyond dispute that a citizen's right to be free from an unlawful arrest is a right

Contrary to petitioners' assertion (Pet. 10), courts of appeals have often held that police officers who conspire to deny citizens their constitutional rights violate Section 241. See, *e.g.*, *United States* v. *Garza*, 754 F.2d 1202 (5th Cir. 1985) (police officers who arrested persons without warrants and without probable cause properly convicted under Sections 241 and 242); *United States* v. *Ellis*, 595 F.2d 154 (3d Cir.) (police officers who participated in scheme to deprive suspect and witnesses of constitutional rights properly convicted under Section 241), cert. denied, 444 U.S. 838 (1979); see also *United States* v. *Barker*, 546 F.2d 940 (D.C. Cir. 1976) ("special" governmental investigators who searched psychiatrist's office without probable cause properly convicted under Section 241); *United States* v. *McClean*, 528 F.2d 1250, 1255 (2d Cir. 1976) (police officers who arrested narcotics dealers and extorted money from them violated Section 241). These decisions also make clear, contrary to petitioners' contention (Pet. 8), that Section 241 does not require proof of "mob" activity outside "official procedures."

2. Petitioners next contend (Pet. 10-12) that their acts were not prohibited by 18 U.S.C. 242 because "due process in the full sense was not denied to * * * any of the * * * persons arrested." Pet. 11. Whatever that argument means, it is wrong. All courts that have confronted the issue, including this one, have held that a police officer who knowingly arrests an individual without probable cause violates

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protected by the Constitution. See, *e.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Motes* v. *Myers*, 810 F.2d 1055, 1059 (11th Cir. 1987); *Lusby* v. *T.G. & Y. Stores, Inc.*, 749 F.2d 1432, 1434 (7th Cir. 1984); *Durso* v. *K-Mart No. 4195 Div. of S.S. Kresge Co.*, 559 F.2d 1274, 1277 (5th Cir. 1977); *Sartin* v. *Commissioner of Pub. Safety*, 535 F.2d 430, 434 (8th Cir. 1976). Thus, petitioners' indictment and convictions under Section 241 were proper.

18 U.S.C. 242.[6] See Pet. App. A13-A14. That is especially so in a case like this one, where innocent citizens were publicly arrested, handcuffed, taken from a subway train, and detained for two hours or more by police officers who knew that their victims had done nothing wrong.

3. Petitioners next argue (Pet. 12-13) that the grand jury was biased against them. To support their claim, however, they point to nothing other than that the indictment mentioned race and the "racial tinderbox" of New York. Pet. 12. That the indictment indicates that petitioners' victims were members of racial minorities in no way suggests that the grand jury was racially biased against petitioners. They otherwise fail to demonstrate how the grand jury was biased against them, simply asserting that it was. Their claim is therefore meritless.

To the extent petitioners complain of the district court's deletion from the indictment of references to race, that

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[6] See *United States* v. *Williams*, 341 U.S. 97 (1951) (conviction of police officer for unlawfully seizing employees suspected of stealing property and obtaining coerced confessions from them proper under Section 242); *United States* v. *Garza*, *supra* (upholding conviction of police officers pursuant to Section 242 for knowingly arresting persons without probable cause); *United States* v. *Walker*, 785 F.2d 1237 (5th Cir. 1986) (same); *United States* v. *Alonso*, 740 F.2d 862 (11th Cir. 1984) (same), cert. denied, 469 U.S. 1166 (1985); *United States* v. *McQueeney*, 674 F.2d 109 (1st Cir. 1982) (same); *United States* v. *Brown*, 204 F.2d 247 (6th Cir. 1953) (explaining that state law enforcement officer who willfully makes arrests without probable cause may be charged under Section 242); *United States* v. *Culp*, 131 F.2d 93 (8th Cir. 1942) (upholding convictions of a sheriff, policeman, and magistrate pursuant to Section 242 for instigating false charges, arrests, and prosecutions); see also *United States* v. *Ramey*, 336 F.2d 512 (4th Cir. 1964) (upholding conviction of justice of the peace pursuant to Section 242 for knowingly using a fictitious warrant to effect a false arrest), cert. denied, 379 U.S. 972 (1965). We are aware of no decision of this Court or any other court that is at odds with these decisions.

argument is also without merit. Not only did the district court strike references to race pursuant to petitioners' request, but the indictment never alleged that their conduct was racially motivated. See Pet. App. A15. Rather, as the court of appeals correctly indicated, "[t]he only reference to race or ethnicity [initially contained in and subsequently deleted from the indictment] was the factual statement in one of the three objects alleged in each conspiracy" specifying the race or national origin of the alleged victims. *Id.* at A14-A15.[7]

4. Finally, petitioners claim (Pet. 13) that the prosecutor improperly commented on their failure to testify when he asked the jury to consider their false statements as evidence of bad faith. The prosecutor stated: "Did they offer any explanation for these lies? No. The defendants put on two witnesses." Pet. App. A17. The district court promptly gave a curative instruction to the jury. As the court of appeals properly concluded, the prosecutor's statement was not a comment on their failure to testify, but "amounted to no more than an allusion to [petitioners'] failure to * * * support their theory that the arrests had been made in good faith." Pet. App. A18. See *United States* v. *Bubar*, 567 F.2d 192, 199 (2d Cir.) ("The prosecutor is entitled to comment on a defendant's failure * * * to support his own factual theories with witnesses."), cert. denied, 434 U.S. 872 (1977); *United States* v. *Bright*, 630 F.2d 804, 825 (5th Cir. 1980) ("[I]t is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely."). Moreover, as the court of

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[7] The government did not argue at trial that the arrests were racially motivated. Rather, it sought to argue that petitioners arrested only members of racial minorities in the belief that they were more vulnerable targets. The district court refused to allow the United States to make this argument (C.A. App. 2088-2090, 2271).

appeals correctly noted, the remark was harmless in light of the district court's curative instruction. Pet. App. A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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